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SUMMARY RECORD OF THE 29th MEETING

Chairman: Mr. ZARIF (Islamic Republic of Iran)

later: Mr. TOMKA (Czechoslovakia)
(Vice-Chairman)

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The meeting was called to order at 3.20 p.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95, A/47/441-S/24559)

1. Mr. SCHARIOTH (Germany) agreed with the International Law Commission's view that the multitude of problems raised by the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and the close linkage between it and, inter alia, the question of State responsibility, now required the establishment of clear-cut priorities. That was why his delegation welcomed the decision taken by the Commission to concentrate first on the issue of preventing activities which had the potential to cause transboundary harm. International law in the field of environmental protection had made great strides during the past decade. Many treaties on international cooperation in that field contained provisions on the prevention of transboundary effects of certain uses of the environment. The Rio Declaration on Environment and Development, for example, spelt out a number of principles aimed at preventing or minimizing possible harmful effects on the environment of other States.

2. Thus the Commission was entirely right in giving priority to that aspect of the topic. His delegation shared the Commission's view that decisions on the other issues explored by the Special Rapporteur should be taken only after the problem of prevention of transboundary harm had been satisfactorily resolved.

3. Mr. FISSENKO (Belarus), also referring to the question of international liability for injurious consequences arising out of acts not prohibited by international law, said that the recent Conference of Rio de Janeiro had demonstrated the world-wide determination to come to grips with the problem of environmental degradation. The International Law Commission was called upon to play an important role in that field.

4. The Chernobyl catastrophe had been a tragedy for the Republic of Belarus, whose territory had been declared a disaster area. The ceaseless efforts made by his Government to attenuate the consequences of the accident were proving inadequate; international cooperation alone would make it possible to achieve tangible results. It was to be hoped that such cooperation would continue and expand.

5. The Commission's work on the topic had proceeded in a satisfactory manner, although more fruitful results might have been expected. The first series of articles already referred to the Drafting Committee represented a good starting-point. The second series of articles proposed by the Special Rapporteur was of a more exploratory nature, but it touched upon the principles of non-discrimination and prevention which would form the essential elements of a future instrument on the topic.

(Mr. Fissenko, Belarus)

6. His delegation endorsed the recommendation in paragraph 349 of the Commission's report concerning the next report of the Special Rapporteur. It agreed that the Special Rapporteur should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm, and should propose a revised set of draft articles to that effect. As to the nature of the articles or of the instrument to be drafted, his delegation associated itself with the view that no decision should be taken until the Commission had completed its work. In drafting the articles, the Commission should take full account of the basic provisions of the Stockholm and Rio Declarations. Its task was to give legal form to the results of the essentially political deliberations of the Stockholm and Rio Conferences.

7. With regard to the programme and working methods of the Commission, his delegation endorsed the tentative schedule set out in paragraph 366 of the report. In particular, it felt that the second reading of the draft articles on the law of the non-navigational uses of international watercourses should be completed as early as possible, followed by the second reading of the draft articles of the Code of Crimes against the Peace and Security of Mankind and the first reading of the draft articles on State responsibility. It also endorsed the Commission's intention to make substantial progress on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" and to undertake work on one or more new topics.

8. His delegation had taken note with interest of the steps to be taken with a view to strengthening the Commission's contribution to the Decade of International Law, including, in particular, the preparation of a series of articles aimed at presenting an overview of the main problems of international law on the eve of the twenty-first century. Greater use should be made of the extensive knowledge and experience of the Commission's members by inviting them to participate in the work of national associations of international law.

9. His delegation unreservedly supported the Commission's efforts to rationalize and streamline the work of its sessions. It also welcomed the Commission's cooperation with other international and regional legal bodies and hoped that such cooperation would be extended to the countries of Eastern Europe, of which the Republic of Belarus was one. Lastly, he called for greater support of the International Law Seminar, which should be attended by the largest possible number of young lawyers from all countries.

10. Mr. Tomka, Vice-Chairman, took the Chair.

11. Mrs. GOLAN (Israel) recalled the view previously stated by her delegation that, because of its complexity and the lack of sufficiently precise rules under current substantive law, the topic of international liability for injurious consequences arising out of acts not prohibited by international law should be approached cautiously. Her delegation therefore fully agreed with

(Mrs. Golan, Israel)

the decision of the International Law Commission to deal with the topic on a stage-by-stage basis and to defer until later the decision as to the nature of the final instrument or instruments to be drafted.

12. With regard to the attribution of responsibility, her delegation agreed with the distinction drawn by the Special Rapporteur between the prevention of transboundary harm and compensation for such harm, as well as with the view that those two questions should be dealt with separately since the proposed articles on prevention were intended only as recommendations or guidelines to States and since the question of compensation did not arise so long as no harm had been caused.

13. Her delegation saw no need to distinguish between activities involving risk and those causing harm for the purpose of determining the applicable preventive measures at the national level, namely, unilateral preventive measures; however, different preventive measures, or different degrees of measures and procedures, should be applied in relations with potentially affected States, depending on the activity involved. Furthermore, in the case of activities involving risk, the obligation to take preventive measures should not entail obligatory compensation or reparation in the event of the occurrence of harm.

14. The principles embodied in articles 1, 2 and 3 of the nine draft articles proposed by the Special Rapporteur should be retained. The consultations provided for in draft articles 6 and 7 must not result in conferring a right of veto on other States which might be concerned or pretend to be concerned. The State of origin should retain freedom of choice as to whom to consult and have the final decision with regard to the proposed activity.

15. Further consideration should also be given to the usefulness of the procedures for settlement of disputes contained in draft article 8. As to draft article 9, the enumeration of the factors to be taken into consideration during the consultations to reconcile the interests of the States concerned should have only indicative or recommendatory force: the States concerned should be free to use other criteria relevant to the activity in question. Lastly, the final text to be adopted on the topic should not be a binding instrument.

16. Mr. HAYES (Ireland), referring to international liability for injurious consequences arising out of acts not prohibited by international law, said that it was disappointing that old arguments had been rehearsed once more in the Commission, not only on detail but also on fundamentals, and even on matters relating to the conceptual basis of the topic. However, the schematic outline adopted by the Commission had already established as the guiding principles for the topic the aphorism sic utere tuo ut alienum non laedas and the idea that the innocent victim should not be left to bear the burden of his loss. It followed from those principles that the topic covered lawful activities and included a requirement to take measures to prevent damage.

(Mr. Hayes, Ireland)

Similarly, the principle protecting the innocent victim necessarily implied compensation for loss that was not due to fault.

17. It was therefore surprising that some members of the Commission should talk (A/47/10, para. 288) about the absence of a clear-cut division between the topic and State responsibility and should refer to "a legal regime where it would be lawful to inflict harm on someone provided that compensation was paid". Rejection of the idea of a regime of strict liability, an idea which some members resisted (A/47/10, para. 289), would constitute rejection also of the principle protecting the innocent victim. Strict liability meant liability that arose other than from fault. It did not imply full compensation for harm regardless of the circumstances or exclude the factors mentioned in paragraph 289; on the contrary, the compensation measures must emerge from negotiations between the parties in which that factor and perhaps others would be taken into consideration.

18. Nor was it reassuring that there should still be a full-blown debate at the present stage on the title of the topic, the nature of the instrument to be prepared, and the interrelationship between preventive measures and reparation and the force to be given to each, as well as on the question of whether the topic should be limited to environmental matters, as emerged from paragraph 287 of the Commission's report. That tendency to narrow the scope of the topic was reflected in the revised definitions of "risk" and "harm", which were too restrictive.

19. The application of the principle sic utere internationally represented a balance between the sovereign rights of States: on the one hand, the right of any State to engage in lawful activities in its territory without being answerable to another State; and on the other hand, the right of any State to enjoy the benefit of its amenities without them being diminished by activities, including lawful activities, of another State. It was therefore illogical to envisage (A/47/10, para. 290) the liability of the operator rather than of the State. It also seemed inappropriate to incorporate in the topic an element of private international law which might also give rise to issues of State immunity by departing from inter-State relations.

20. His delegation was pleased that the Commission had established a working group to consider the general issues relating to the scope of the topic, the approach to be taken, and the possible direction of future work, but it could not understand why the Commission had concluded that it would be premature to take a decision on the scope of the topic. It wondered whether, in the case of a topic involving considerable developmental work as well as codification, it was possible to draft articles without knowing the final form which they would take. However, it welcomed the conclusion that the topic embraced both prevention and remedial measures. It was uncertain about the decision to work in stages and about the choice of a very limited aspect of the topic for consideration as the first stage, but it hoped that such a procedure would at least enable the Commission to move on from inconclusive general debates and make some progress.

(Mr. Hayes, Ireland)

21. Lastly, the Irish delegation urged the Commission to concentrate on identification of the principles governing the topic and to take into account the work being done in more political forums on what was an important topic. However, while the Commission should take such work into account, it should not merely give it appropriate legal form, as suggested in paragraph 287 of the report.

22. Mr. POSTICA (Romania) said that State responsibility was a fundamental element of international law and that the draft articles, which had been written in a form which would enable them to be turned into a convention on State responsibility for internationally wrongful acts, were of undeniable topicality. In fact, in an international society lacking a universal legislature and judiciary in which, by virtue of its sovereignty, a State took its decisions in freedom and came into conflict with an equal freedom on the part of other States, that important element of international law was a necessary mechanism for regulating relations between States. In international terms, the principle of the responsibility of States was as old as the principle of their equality and could therefore be described as its corollary. States were equal, but they were so in rights as well as in duties.

23. However, despite recognition of the principle, the law of international responsibility remained basically customary law and very controversial and confused. That was why its codification was difficult. Furthermore, the Commission was aware of the difficulties raised by the topic and had rightly noted that while it was one thing to define a rule and the content of the obligations it imposed, it was something quite else to determine whether that obligation had been violated and what the consequences thereof should be.

24. In that context the legal regime of countermeasures was one of the most difficult subjects of the whole topic, as could be seen from the contradictions which had emerged during its discussion. The Special Rapporteur had rightly opted for the notion of "countermeasures" rather than "reprisals" or "boycott", which smacked more of the idea of punishment. Nevertheless, that choice prompted questions as to the soundness of the decision to deal with countermeasures separately in the general scheme of the draft articles.

25. Given the divergence of views in the Commission itself and the often contradictory suggestions made during the consideration of the topic, his delegation hoped that the Special Rapporteur and the members of the Commission would reflect in greater depth about the legal, the political, and especially the practical consequences of the approach proposed so far in the text of the draft articles.

(Mr. Postica, Romania)

26. Aside from the wording of the articles on countermeasures, it should be noted that they were subject to certain specific conditions which should be defined, even if the list could never be exhaustive or perfect. In that respect, his delegation associated itself with the comments made by other delegations at the current session regarding the essential conditions that would justify resort to countermeasures. First, draft article 11 rightly envisaged that lawful resort to countermeasures was conditional upon the actual existence of an internationally wrongful act and the prior submission by the injured State of a "demand" of cessation/reparation. Second, the principle of exhaustion of settlement procedures set forth in draft article 12 was a well-established principle of general international law. Third, respect for well-defined prior conditions must be guaranteed by appropriate means in order to eliminate all subjectivity in determining the existence and seriousness of the wrongful act, while at the same time strengthening the means for the peaceful settlement of disputes. A balance needed to be found between the need to monitor resort to countermeasures and the need to avoid favouring the offending State.

27. His delegation supported the approach taken by the Commission with regard to its programme, procedures and methods of work and, like other delegations, welcomed the results of the work of its Drafting Committee. The Committee, in the resolution on the report of the Commission on the work of its forty-fourth session, should give the Commission a precise mandate for its forty-fifth session. To that end, his delegation was prepared to take part in informal consultations in order to reach a consensus.

28. Mrs. FLORES (Uruguay) said that while she supported the decision to consider the question of prevention before taking up the question of reparation in the context of international liability for injurious consequences arising out of acts not prohibited by international law, she did not support the idea of giving the provisions on prevention the form of recommendations. The reasons put forward in paragraphs 283 and 284 of the Commission's report (A/47/10) were not sufficiently compelling; there was nothing to prevent the inclusion of primary rules in the draft articles, and other matters such as immunity of States from jurisdiction in courts of other States could be resolved. It could be envisaged that the State of origin of transboundary harm would be unable to invoke immunity of jurisdiction, and equality of access to the courts could be established.

29. As to the nature of the future instrument, her delegation continued to advocate the drafting of a framework convention with binding force, without prejudice to the bilateral treaties which might be negotiated. As noted in the Commission's report, certain instruments, for example the Rio and Stockholm Declarations, set forth principles relating to the rights and obligations of States concerning the use of their territory, and areas or objects under their jurisdiction or control. Those principles, in particular principles 2, 6, 7, 9, 11, 13, 15, 16, 17, 18, 19, 25, 26 and 27 of the Rio Declaration, which reproduced various provisions of the Stockholm Declaration,

(Mrs. Flores, Uruguay)

could be incorporated in the instrument to be drafted. It would be necessary to take into account principle 13, which was applicable to transboundary harm (to persons, property and the environment), under which States were invited to develop national law regarding compensation for damage caused. In the view of her delegation, that should be one of the objectives of the draft articles.

30. With regard to the new draft articles submitted by the Special Rapporteur, her delegation, on the question of assessment of harm, supported the requirement of prior authorization by the State under whose jurisdiction or control the activities envisaged were to be carried out, and believed that such authorization should be a mandatory requirement. However, there was no reference to activities which had already been undertaken and were liable to cause transboundary harm. Similarly, a provision should be included to the effect that before authorizing activities which were liable to cause harm, the State should conclude an agreement with the States which might be affected. It was becoming increasingly necessary to have objective rules based on technical criteria that would offer guarantees with regard to the conduct of such activities.

31. As to article 2, her delegation believed that the first obligation of a State of origin which, following an assessment, determined that an activity would certainly or probably cause significant transboundary harm was to not authorize it. It should seek a way of avoiding the harm or reducing it to a minimum and, in the latter case, should conclude an agreement with the State or States which might be affected before authorizing the activity.

32. Article 4 should be closely linked with the procedure for the peaceful settlement of disputes. The establishment of such a procedure was esential so as to make it possible to settle disputes within reasonable periods of time. Her delegation did not support the provisions of article 5, because if the hypothesis envisaged occurred, the State under whose control the activity concerned would be carried out should not authorize it, and a negotiating procedure should be initiated with the State liable to be affected. The right accorded to the affected State in that provision was only one of the options available to the State under whose control the activity concerned would be carried out. Lastly, article 9 should indicate that the list of factors was not exhaustive. Moreover, those provisions should be formulated so as to take into account the special situation of developing countries.

33. Mr. SALEEM (India) said that the International Law Commission had not made much progress on the subject of international liability for various reasons: initially, it had had to define the parameters of the subject in order to distinguish it from the subject of international watercourses, on the one hand, and State responsibility on the other. In the field of the environment, developments were fast and sweeping and needed to be brought into focus. Liability in that area was dependent upon agreement on the basic principles governing various activities. For example, liability concerning air pollution could only be considered after agreement had been reached on the

(Mr. Saleem, India)

general principles governing or limiting air pollution and standards for air quality had been fixed. The general principles on the basis of which liability was being considered in the Commission were not yet settled, as there were differing views. Moreover, the Commission had not been able to consider the subject because other items on its agenda had had priority.

34. Although the subject was very important, careful analysis of the texts was required before they were finalized. A conceptual framework would have to be settled before specific draft articles could be considered. That framework should deal not merely with the problem of liability but also with conditions for its operation. It was also important to transfer resources, particularly financial resources, to financially weaker and developing countries in order to enable them to organize their economies and their practice in an environmentally friendly manner, and so as to provide programmes of international assistance to transfer know-how and financial resources in case of emergencies and help States be prepared for dealing with natural or environmental crises.

35. The principle that a State should bear full responsibility for any activity that might take place within its boundaries was too simple and general to take adequately into consideration the many different situations which could affect activities within the territory of a State. The responsibility of financially independent multinational corporations whose governing bodies were drawn from different countries or were internationally constituted would require to be handled on its own, and not under the general principles of responsibility.

36. The special needs and limitations of financially weaker and developing countries required in-depth study, as a separate matter. Their dependence on foreign sources of technology, funding and basic necessities was a determining factor to be taken into account before fixation of liability upon such States for activities conducted within their borders.

37. Certain principles of procedure discussed by the Commission, such as the principle of notification, consultation, negotiation, and settlement of disputes concerning an environmentally "dangerous" activity, were not convincingly treated. Those principles deserved to be discarded where they entered into conflict with other equally important concepts of international law, namely, the sovereign equality of States and the sovereignty of States over their people, territory and natural resources. Most of those procedural principles, instead of facilitating cooperation, could easily engage States in disputes, particularly when such States did not have an agreed understanding on measures to be employed, safety standards to be monitored and steps to be taken in the case of activities which entailed bearing risk or were inherently dangerous.

(Mr. Saleem, India)

38. The question could also be asked whether a common code on liability would be desirable, or indeed necessary. For example, it had been considered preferable to deal with hazardous nuclear activities within the framework of a convention on liability for damage caused by nuclear activities. Similarly, it had been considered that activities concerning environmental pollution, and more specifically the ozone layer, were better dealt with in a separate convention.

39. The topic of liability for injurious consequences arising out of acts not prohibited by international law should be carefully delimited in scope. The topic should avoid dealing with specialized regimes, such as that of nuclear liability, which were negotiated separately by States, or with activities which were otherwise regulated by existing norms and conventions. Moreover, the Commission should not consider certain issues which were currently being dealt with by States in the field of biodiversity and climate change.

40. In considering the topic, the Commission should carefully proceed on the basis of known concepts of tort law, where a close nexus between the source and the effect provided the basis for liability. However, depending on the needs of the international community and the consensus available, exceptions could be made to the standard theory of liability by indicating expressly the circumstances and reasons for such deviations. In that regard, the role of strict or absolute liability should be investigated.

41. The Commission should also provide for liability of the operator for the conduct of his activities when they resulted in loss or damage, subject to the defences available to him. Innocent victims must be given due and prompt compensation, subject to the considerations of public policy in promoting certain activities for which a ceiling should be fixed on pecuniary compensation.

42. Given the availability of insurance systems, it might also be agreed to establish special funds, either financed by operators or established by States in accordance with their national laws. Where the operator or his insurance could not compensate in a reasonable manner for the damage caused, additional compensation could be provided from other funds established by contributions from the operator or the State.

43. In addition, while the State had some important functions to perform through its legislative, executive and judicial bodies in setting standards in that field, monitoring their implementation and ensuring their observance, it should not be automatically held liable for damage which might occur as a result of activities undertaken within its territory. Such liability should basically lie with the operator. State liability should only be envisaged by way of exception, unless the State itself was the operator. The Commission was quite correct in its decision to consider first the issues concerning prevention of damage. As part of that effort, it could consider the issue of liability for damage resulting even after necessary preventive steps had been taken or in spite of such steps.

(Mr. Saleem, India)

44. In conclusion, his delegation had an open mind as to the form the outcome of the Commission's work should take, a draft convention or a body of principles or guidelines.

45. Mr. POLITI (Italy) said that the adoption of a definitive text of the draft articles on State responsibility would represent an essential step forward in the codification of international law in that field and a major contribution to the Decade of International Law.

46. His delegation had reviewed with special interest the chapter of the Commission's report on the topic and was pleased to note that the forty-fourth session had been particularly fruitful in that regard. The progress of the work had been so substantial that there were good prospects for the first reading of the draft articles to be completed by 1996. In that connection, his delegation did not believe that it was necessary to include provisions on the settlement of disputes in Part Three of the draft in order to complete the work. Since there was no inherent connection between that question and the topic of State responsibility, it could be treated separately in relation to the different systems of primary rules accepted by States.

47. With more specific reference to the question of the regime of countermeasures, his delegation shared the view that, since law enforcement mechanisms were far from perfect in international society, injured States should retain the faculty of taking direct and independent action to restore compliance with international law. That faculty should, however, be exercised within the carefully defined limits of a regime aimed at preventing every possible abuse. His delegation also agreed with the approach suggested by the Special Rapporteur concerning various important elements of the draft being prepared: the reduction and possible elimination of the punitive component of countermeasures, the need for a precise definition of the notion of countermeasures in relation to the concepts of reprisals, sanctions and measures of retortion, and the opportunity to deal with the issue of countermeasures as a reaction to internationally wrongful acts falling within the category of delict before moving to the question of the consequences of so-called international crimes.

48. There were many merits in the formulation of draft articles 11 to 14 and 5 bis as proposed by the Special Rapporteur. A proper balance was ensured between the need to provide legal rules that were workable and effective and the need to lay down strict conditions and rules under which the use of countermeasures could be regarded as lawful. That did not mean, of course, that a totally satisfactory solution had been found to all the complex issues raised by the proposed scheme. On the other hand, it should be possible to find a satisfactory solution to even the most controversial questions considered by the Commission, such as the conditions for the use of countermeasures, proportionality, prohibited countermeasures and the violation of erga omnes obligations.

(Mr. Politi, Italy)

49. The topic of international liability for injurious consequences arising out of acts not prohibited by international law not only involved the consideration of very difficult theoretical problems, but was also characterized by a practice which was anything but uniform. At the same time, the Italian delegation noted with satisfaction the Commission's work on the item, and expressed appreciation to the Special Rapporteur for his conduct of the work.

50. With regard to the future programme of work of the Commission, the decisions taken had the merit of having been based on a consensus which could be reflected in tangible results in the near future. At the same time, the Italian delegation wished to make a few observations on some of the points addressed in the report of the Commission and the eighth report of the Special Rapporteur.

51. First of all, the draft under discussion should include rules on the prevention of transboundary harm. Since one of the main objectives of the draft was to provide a legal framework for the regulation of the various sectors of activity involved, it would be difficult to justify the absence of rules concerning preventive measures, whether unilateral or procedural, to the definition of which States had devoted so many efforts in the field of environmental protection. Of course, that raised a number of theoretical difficulties, relating essentially to the overlap between that issue and the issue of State responsibility. There were various ways of overcoming those difficulties, for example, through the development of provisions of a recommendatory nature, as suggested by the Special Rapporteur. Nevertheless, there was a need to indicate, concisely but clearly, what the State's fundamental obligations were with regard to the control of hazardous activities carried out within its jurisdiction, as well as notification, information and consultation with affected States or potentially affected States.

52. As to the distinction between activities involving a risk of transboundary harm and activities with harmful effects, which had led the Commission to concentrate its efforts on the question of the prevention of activities involving risk, the Italian delegation shared the doubts expressed by other delegations concerning the real need to treat the said activities separately. On the one hand, the obligation of prevention did not differ greatly in the two situations, while on the other hand, the definition of such an obligation in a single set of rules would simplify the draft and would eventually facilitate the application of the future regime of international liability.

53. With regard to compensation, the obligation to compensate which was incumbent upon the State of origin should be of a residual nature. The regime under elaboration should take due account of the various aspects of the relationships between the civil liability of the operator and the international liability of the State. A well-designed and flexible system

(Mr. Politi, Italy)

could establish the right balance in that area between the need to compensate innocent victims and the need for the costs to be shared equitably between the operator, insurance companies, private and public funds and the State of origin of the activity concerned.

54. Lastly, the nature of the future instrument on international liability should be decided on the basis of the same flexible approach. While such a decision could certainly be deferred to a later stage, his delegation wondered whether it might not be preferable for the Commission to take a decision before the completion of its work, in particular with regard to issues such as prevention, on which a consensus could more easily be reached once the nature of the articles to be drafted had been defined.

55. Mrs. VALDES (Cuba) said that the section of the report of the International Law Commission which dealt with the establishment of an international criminal jurisdiction had raised many doubts among the members of her delegation. In the first place, it was to be feared that the establishment of such a court might encroach on the national jurisdiction of States, thus impairing their sovereignty. Secondly, the members of the Working Group did not appear to have reached agreement on the structure of such a mechanism: some felt that the court should be a standing body, comparable to the International Court of Justice, or should even be a chamber of the Court, while others thought that it should take the form of a special mechanism, pre-existing but not permanent, which would be convened only when there were reasons to believe that a norm of international law had been violated. There was a similar divergence of views with regard to the composition and jurisdiction of the court. Some thought that it should have jurisdiction only over crimes against international peace and security, such as those defined in the draft Code of Crimes; others believed that its jurisdiction should extend to other types of offences. Nor had a consensus been reached on the question of the type of instrument which would establish such a court: should it be a treaty? Should the court's jurisdiction be binding or optional?

56. Some delegations had proposed that the court should be linked in some fashion to the Security Council. In that connection, a strict reading of the Charter of the United Nations did not elicit any mention of that possibility as one of the responsibilities attributed to the Security Council, whose competence was clear and did not lend itself to sophistic interpretations.

57. For all those reasons, Member States should have time to study the question carefully before giving the Commission a mandate to proceed with its work on the subject.

58. With regard to chapter III of the report and, in particular, the countermeasures which an injured State could take against a State having committed an internationally wrongful act, the Cuban delegation shared the

(Mrs. Valdes, Cuba)

view expressed in paragraph 124 of the report, namely, that powerful or rich countries could easily enjoy an advantage over weak or poor countries in the exercise of the means of redress in the form of reprisals or countermeasures.

59. Furthermore, the fact that countermeasures had not been codified in the past had never prevented powerful countries from resorting to their use against weaker countries. Despite the stipulation that the regime of countermeasures would exclude the use of military force, it contained the seeds of aggression because, as Cuba had repeatedly stated over the years, political coercion and economic pressure were as much forms of aggression as was military force.

60. Moreover, the uncertainty surrounding some aspects of the topic should be an inducement to even greater caution. Indeed, who would determine in each instance, and on the basis of what criteria, whether an act of aggression had occurred which justified the use of countermeasures? Who would measure the gravity of the harm caused, so as to ensure that the reprisals carried out by the country which deemed itself to have been injured were not disproportionate? Who could show that the injured country really had exhausted all methods of peaceful settlement before resorting to such measures? If all those questions were to be answered by the country which claimed to have been injured, neither the impartiality nor the validity of the decisions to be taken could be absolutely guaranteed. Accordingly, the Cuban delegation questioned whether it would be desirable for countermeasures to be embodied in international law.

61. Lastly, the Commission had for a long time assisted developing countries by organizing seminars for them in conjunction with its work. It would be desirable to find a means of increasing the Commission's efforts in that area without an excessive commitment of funds.

62. Mr. KAZI (Pakistan) said he was pleased with the level of debate and with the progress made in the International Law Commission on the question of State responsibility. He hoped that the Commission would complete the first reading of the draft articles before the end of the current term of office of its members. It was true that the instrumental consequences of an internationally wrongful act, or countermeasures dealt with in the third and fourth reports of the Special Rapporteur, represented one of the most difficult subjects within the whole topic. In the absence of an institutionalized system which could be set in motion against a State that had committed an internationally wrongful act, the injured State could only rely on its own actions to stop the wrongful act and initiate remedial measures. Opinions within the Commission were divided as to whether provisions on countermeasures should be included in the draft. It was difficult to define a countermeasures regime, not least because of the disparities in the size, power and level of development of States. As the Special Rapporteur had pointed out, powerful or rich countries enjoyed an advantage over the weak or poor in the exercise of reprisals or countermeasures. In defining the legal regime of countermeasures, then,

(Mr. Kazi, Pakistan)

particular attention should be given to the situation of developing, poor and weak countries, in order to prevent the regime from becoming a tool of power politics. The subject needed further consideration by Member States and the Commission.

63. With regard to the draft Code of Crimes against the Peace and Security of Mankind, he noted that differences existed within the Commission on the question of establishing an international criminal court or international trial mechanism and that many complex issues remained unresolved, particularly with regard to the jurisdiction of such a court. Indeed, the Chairman of the Commission had himself recognized that fact when introducing the Commission's report and had stated that some members had questioned the feasibility of establishing an international criminal jurisdiction, an idea which involved the surrender of sovereignty by States, raised constitutional difficulties for some States and entailed the risk of undermining the validity of the well-established principle of aut dedere aut judicare.

64. Members of the Commission were also divided on other questions, such as who might be entitled to bring a complaint before the court, which State or States would have to give consent for the court to have jurisdiction in respect of an individual charged with a crime, which law would be applicable, what relationship would exist between the court and the Security Council, and how compensation procedures should be defined.

65. It was a basic principle of criminal law that offences must be defined clearly and punishment provided for in advance, since criminal law could not be applied retroactively. In order to investigate a crime and try the alleged perpetrators, a code of criminal procedure was necessary which provided for: registration of crimes, arrest of the accused, interrogation of the accused or suspects, hearing of witnesses, gathering of evidence, hearing of expert witnesses if necessary, confession of the accused, if any, and the power of the investigating officers to detain the accused during the investigation. The powers and functions of the prosecutor, who was required to assist the court impartially, must also be properly defined. Provision must also be made for trial procedure, and States would have to amend their existing laws for that purpose. In addition, the law of evidence would have to be codified.

66. Furthermore, the rights of the defence must be safeguarded. The accused might experience difficulties in defending himself if he was tried far from his own country and might have trouble engaging a competent lawyer, especially if he was without means. In some cases an interpreter might also be necessary. The venue of the trial was an important factor; the trial might be held either in the country where the offence had been committed or at the headquarters of the international criminal court.

67. Finally, the principle of the right to appeal must be respected. An appellate authority should therefore be set up to hear appeals against the judgements of any proposed court, whether of acquittal or conviction. Provision should also be made for a time-limit for the filing of appeals.

(Mr. Kazi, Pakistan)

68. In preparing a draft statute for an international criminal court, the Commission must examine all the questions he had just raised. States should be given an opportunity to study in detail all the aspects of the many complex issues raised in the Commission's most recent report. The relevant ministries needed to study and analyse the implications of the establishment of an international criminal jurisdiction, and it was therefore prudent to seek the views of States before proceeding further on the question.

69. Mr. SIDI ABED (Algeria) was pleased that paragraph 114 of the report reaffirmed the original link between the two aspects of State responsibility, namely the responsibility that derived from internationally wrongful acts and the responsibility that derived from acts not prohibited by international law.

70. His delegation believed that the question of countermeasures, the instrumental consequences of an internationally wrongful act, had its origins in the practice of certain States, which also happened to be the most powerful ones. Only if the most careful safeguards were included could countermeasures aspire to universal acceptance and thus to codification in international law. Any attempt at codification that failed to take into account the de facto inequalities between States would only give legal sanction to a practice which was questionable to say the least, particularly as there was no supranational authority capable of remedying the situation when the rules of international law were violated.

71. Exhaustion of all means of peaceful settlement, exclusion of the use of force, and respect for the sovereignty and territorial integrity of States were the conditions to which recourse to countermeasures must be subject if abuses were to be avoided.

72. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation, aware of the complexity of the topic, believed that it was still premature to take a definitive decision on the nature of the legal instrument to be drafted. It should remain understood, however, that the basic objective was to succeed in elaborating binding rules. The legal status of the topic had occasionally been challenged, due to the lack of rules of international law establishing liability in cases in which no wrongful act had been committed. In his delegation's view, the topic's legal foundations lay in States' responsibility to answer for their actions and in their obligation to make good any harm caused. Under existing international law, it was up to each State to take all the necessary precautions to prevent the injurious consequences which might arise from dangerous activities. That was an obligation of vigilance which would benefit from being more precisely defined and developed.

73. The Commission should devote particular attention to the situation of the developing countries, which did not always have the financial and technical resources to enable them to carry out dangerous activities in conditions of

(Mr. Sidi Abed, Algeria)

adequate safety. In any case, his country considered that the topic was sufficiently important to justify the Commission's according it priority.

74. Mr. KNOX (United States of America) said that, as the Commission itself had noted at its two most recent sessions, it was having difficulties in coming to grips with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. In particular, the Commission had been unable to decide what type of instrument it should develop: a convention or a set of guidelines. On a number of occasions, his Government had expressed its preference for non-binding guidelines, given that that area of the law was still at an early stage of development. The Commission had of course decided to defer a final decision on that question until it had completed its work on the topic, and his delegation hoped that as the deliberations continued, it would become increasingly clear that guidelines were preferable to binding rules.

75. Noting that the Commission had decided to divide the topic into two parts - prevention and remedial measures - and to discuss prevention first, his delegation hoped that, by focusing its attention on drafting articles in respect of activities involving a risk of causing transboundary harm before it turned to remedial measures, the Commission might be able to make progress.

76. With regard to the "procedural" aspects of the topic, which were considered by the Special Rapporteur in his eighth report, he welcomed the draft provisions on notification and consultation. One of the Commission's goals in that area should be to recommend procedural guidelines for cooperation and negotiation between States, with a view to resolving potential problems before they caused actual harm.

77. His delegation remained concerned, however, that the Commission had still not clearly defined the scope of the topic. It was difficult to see how it could reach agreement on substantive rules on prevention before it had determined what activities would be covered. The Commission should focus on activities commonly thought of as ultra-hazardous. The further it strayed from that ground, the more it ran the risk of discussing, on the one hand, activities prohibited by international law, thus trespassing on the area of State responsibility, and, on the other, of considering activities which did not entail a risk of significant harm. In particular, clarification of the relationship of the topic to the related topic of State responsibility would, more than any other decision, strengthen the conceptual basis for the Commission's work.

78. Concerning the Commission's programme of work and its procedures, his delegation applauded the decision to suspend consideration of the topic entitled "Relations between States and international organizations", since it had long felt that such work was unnecessary. In addition, it had noted with great interest the decision contained in paragraph 369 of the Commission's report with regard to the consideration of new topics in the context of its

(Mr. Knox, United States)

long-term programme of work. Possible new topics should be discussed thoroughly at the forty-eighth session of the General Assembly on the basis of the Commission's recommendations.

79. His delegation also welcomed the new guidelines for the composition and working methods of the Drafting Committee, which should contribute to the effectiveness of that crucial body. Finally, he welcomed the Commission's efforts to streamline its report, which was now easier to read; that would undoubtedly help to promote a more fruitful relationship between the Sixth Committee and the International Law Commission.

80. Mr. CORELL (Sweden), speaking on behalf of the Nordic countries, said in connection with the organization of the Commission's work that those countries noted with appreciation that the Commission had continued to review its programme, procedures and working methods and had in several respects responded to suggestions made by the Nordic countries in previous years. The Commission had thus demonstrated that it was prepared to adapt its working procedures to ensure a more efficient use of the resources allocated to it. That was confirmed by the guidelines on the work of the Drafting Committee, and it was to be hoped that the Commission's decision to devote the first two weeks of its next session to the work of that Committee on the topic of State responsibility would lead to considerable progress on the first reading of the draft articles.

81. The Nordic countries also welcomed the Commission's efforts to restructure its annual report, efforts which were evident from its most recent report. The general overview of each topic was much clearer than before, and the way in which problems requiring guidance from the Sixth Committee had been highlighted (in chap. I of the report) was excellent. Unnecessarily long reports could also be avoided by, for example, making the summary of debates more compact and emphasizing trends of opinions. The Nordic delegations also agreed that it was counterproductive to present information on the consideration of topics to the Sixth Committee when only fragmentary results had been achieved.

82. The Commission had continued to concern itself with new topics which might be included in its long-term programme of work. In that connection, the Nordic countries considered that the topics chosen should respond to the most pressing needs of the international community and should be of a practical rather than theoretical nature. Moreover, their consideration should be amenable to completion within a foreseeable period of time. In view of the debate in the Sixth Committee on an international criminal court, the elaboration of a statute for such a court should be regarded as a matter of priority.

83. In conclusion, the Nordic countries considered that the way in which the Commission had conducted the work of its forty-fourth session and had structured its report had greatly facilitated the debate in the Sixth Committee: the Commission and its Chairman were to be commended for that.

The meeting rose at 5.35 p.m.